LOOKING BEYOND *LOPEZ*: ENFORCING THE SEX OFFENDER REGISTRATION AND NOTIFICATION ACT UNDER THE COMMERCE CLAUSE

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I. INTRODUCTION

Studies consistently report that sex offenders, especially those who committed crimes against children, have high rates of recidivism.[1] One study, for example, found that forty-three percent of child molesters re-offended within four years.[2] Enraged by the large number of sexual offenses by repeat offenders, the public initiated a concerted effort to combat the presence of sex offenders in their communities.[3] In response to this public outrage, Congress enacted a series of statutes in the last fifteen years aimed at protecting the public from sex offenders. The most recent, the Adam Walsh Act ("AWA"), includes the Sex Offender Registration and Notification Act ("SORNA"), legislation that establishes a public national sex offender registry and, for the first time, punishes offenders who fail to register or update their registry.[4]

Although Congress's intentions were noble, its power under the Constitution to enact such legislation has been, and is continuing to be, questioned. One common challenge to the statute is that Congress lacks the authority under the Commerce Clause to punish a sex offender for the failure to register. The majority of courts have rejected this argument and found SORNA's criminal provision constitutional. Yet, SORNA's unique statutory language and purpose have caused these courts to disagree over why Congress should be allowed to criminalize such conduct.

Section II of this Comment will summarize key Commerce Clause precedent, provide an overview of SORNA and its predecessor statutes, and discuss how courts have analyzed SORNA under the Commerce Clause. Next,

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1. Center for Sex Offender Management, *Recidivism of Sex Offenders*, May 2001, http://www.csom.org/pubs/recidsexof.html.
2. *Id.* (discussing a 1988 Barbaree and Marshall study).
3. *See* Parents for Megan's Law, http://www.parentsformeganslaw.org/public/meganFederal.html (last visited Mar. 1, 2010).
4. *See* 42 U.S.C. § 16901 *et seq.* (2006); 18 U.S.C. § 2250 (2006).

Section III will explain why SORNA is different from prior criminal statutes enacted under the Commerce Clause and argue that courts have correctly upheld the enforcement provision, but under faulty reasoning. Specifically, courts should reach two conclusions after analyzing SORNA: (1) that a jurisdictional element alone cannot render a statute constitutional under *United States v. Lopez* unless the jurisdictional element is tied to the regulated activity; and (2) that the Supreme Court's holding in *Gonzales v. Raich* should apply to statutes regulating the channels or the instrumentalities of interstate commerce, and thus SORNA is constitutional.

II. BACKGROUND

A. Congress's Commerce Clause Power

The Constitution grants Congress the power "[t]o regulate commerce with foreign nations, and among the several states, and with the Indian tribes."[5] Although the Commerce Clause is short in length, the body of case law interpreting its meaning is immense and spans over two centuries. The "new era" of Commerce Clause jurisprudence, however, is relatively brief and begins with *United States v. Lopez*,[6] which articulated the three areas Congress is authorized to regulate under the Clause.[7] The *Lopez* categories have become the framework for nearly all Commerce Clause analysis and federal statutes must fall under one of the categories to be constitutional.[8] The Supreme Court has revisited the breadth of Congress's Commerce Clause authority only twice after deciding *Lopez*. In *Morrison v. United States*, the Court further explained the particular factors to be considered when evaluating statutes regarding the third *Lopez* category, activities that substantially affect interstate commerce.[9] Subsequently, in *Gonzales v. Raich*, the Court upheld a comprehensive regulatory scheme under the third *Lopez* category, even though it only regulated purely intrastate activity.[10]

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5. U.S. CONST. art. I, § 8, cl. 3.
6. United States v. Lopez, 514 U.S. 549 (1995).
7. *See* Gonzales v. Raich, 545 U.S. 1, 16 (2005).
8. *Id*.
9. United States v. Morrison, 529 U.S. 598 (2000).
10. *Gonzales*, 545 U.S. 1.

1. United States v. Lopez

In *Lopez*, the United States charged the defendant, a twelfth grade student, with possessing a gun at his high school in violation of the Gun-Free School Zones Act of 1990.[11] The Act made it a federal offense to possess "a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone."[12] The provision did not require that the gun or the student travel in interstate commerce,[13] nor did it contain findings by Congress that the regulation related in any way to an economic activity.[14] In the first Supreme Court ruling to strike down a federal statute in over fifty years, the Court held that the Act was unconstitutional under the Commerce Clause.[15]

The Court first examined key constitutional principals and Commerce Clause precedent, noting that the Commerce Clause is a limited delegation of power to Congress.[16] After summarizing the evolution of the Court's Commerce Clause jurisprudence, the Court recognized "three broad categories of activity that Congress may regulate under its commerce power:" (1) "the use of the channels of interstate commerce;" (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities;" and (3) "those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce."[17]

Finally, the Court analyzed the provision under the third category, activities having a substantial affect on interstate commerce, because the Gun-Free School Zones Act did not regulate an activity falling under the first two categories.[18] Ultimately, the Court found that the statute exceeded Congress's power under even the third category because (1) it failed to regulate any "economic enterprise;"[19] (2) it lacked a jurisdictional element tying it to interstate commerce; (3) it did not contain legislative findings demonstrating its effect on interstate commerce; and (4) the government's reasoning that violent crime affects the national economy was flawed.[20]

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11. *Lopez*, 514 U.S. at 551.
12. 18 U.S.C. § 922(q)(1)(2)(A) (2006), *invalidated by Lopez*, 514 U.S. at 549.
13. *Lopez*, 514 U.S. at 559.
14. *Id.* at 563.
15. *Id.* at 551.
16. *Id.* at 552.
17. *Id*. at 558–59.
18. *Id.* at 559.
19. *Id.* at 561.
20. *Id.* at 563–64.

2. United States v. Morrison

The Supreme Court again considered Congress's Commerce Clause power and its ability to regulate activities substantially affecting interstate commerce in *United States v. Morrison*.[21] In *Morrison*, a former student brought a claim under the Violence Against Women Act of 1994 ("VAWA") seeking compensation for being a victim of a gender-motivated crime committed by a fellow student.[22] Similar to the statute in *Lopez*, the VAWA provision did not regulate an economic activity, but rather created a civil remedy for victims of a "crime of violence motivated by gender."[23] While recognizing that a congressional enactment is entitled to a "presumption of constitutionality,"[24] the Court struck down the provision after further elucidating the factors alluded to in *Lopez*.[25]

Similar to the statute in *Lopez*, the VAWA did not regulate an activity involving the use of the channels of interstate commerce, or the people, things, or instrumentalities in interstate commerce, and therefore, the statute's only hope of constitutionality remained under the third *Lopez* category.[26] To determine whether the regulated activity, gender motivated violence, substantially affected interstate commerce, the Court analyzed whether: (1) the activity was economic in nature;[27] (2) the statute contained an express jurisdictional element;[28] (3) the legislative history included express congressional findings demonstrating a substantial affect on interstate commerce;[29] and (4) the link between the regulated activity and its "effect on interstate commerce was attenuated."[30]

Applying these four factors, the Court found that the provision was not a valid exercise of Congress's powers under the Commerce Clause because gender motivated violence was not an economic activity, the statute contained no jurisdictional element, and although Congress included findings attempting to demonstrate the statute's tie to interstate commerce, the findings established a mere attenuated link between the activity and interstate commerce.[31]

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21. United States v. Morrison, 529 U.S. 598 (2000).
22. 42 U.S.C. § 13981(b) (2000).
23. *Morrison*, 529 U.S. at 605.
24. *Id.* at 607.
25. *Id.* at 617.
26. *Id.* at 609.
27. *Id.* at 610.
28. *Id.* at 611.
29. *Id.* at 612.
30. *Id.*
31. *Id.* at 617.

Notably, the Court also distinguished the section at issue from another provision of the VAWA that regulated gender-motivated crime committed *during* interstate travel.[32] The other VAWA prohibition had been previously upheld by the Courts of Appeals under the first *Lopez* category, the use of the channels of interstate commerce, and the Court did not cast doubt upon the validity of this holding.[33]

3. Gonzales v. Raich

After consecutively overturning two federal statutes in *Lopez* and *Morrison*, the Court re-established its deference to congressional enactments in *Gonzales v. Raich*.[34] In *Gonzales*, the Court evaluated a Commerce Clause challenge to the Controlled Substances Act ("CSA"), a comprehensive regulatory scheme categorizing all controlled substances and "making it unlawful to manufacture, distribute, dispense, or possess any controlled substance except in a manner authorized by the CSA."[35] The issue in *Gonzales* centered on whether Congress had the power to regulate the defendants' purely intrastate manufacture, possession, and use of marijuana for medicinal purposes.[36]

The Court found that, although the activity of growing and using marijuana for medicinal purpose was itself not commercial and purely intrastate, its regulation was essential for the successful regulation of the interstate commercial activity, *i.e.* the national market for controlled substances.[37] Thus, the defendants' intrastate activity, when aggregated, could undermine the federal scheme regulating interstate commerce.[38] The Court accordingly "refuse[d] to excise individual components of [the] larger scheme."[39]

In its analysis, the Court did not apply the four factors set out in *Lopez* and *Morrision* but instead relied heavily on the fact that the CSA was "comprehensive legislation"[40] and "at the opposite end of the regulatory spectrum"[41] from the statutes at issue in *Lopez* and *Morrison*. The Court found

32. *Id.* at 613 n.5. (comparing it to 18 U.S.C. § 2261(a)(1) (2000)).
33. *Id.*
34. Gonzales v. Raich, 545 U.S. 1 (2005).
35. *Id.* at 13; *see* 21 U.S.C. §§ 841(a)(1), 844(a) (2006).
36. *Gonzales*, 545 U.S. at 15. The defendants' actions were legalized in California under the state's Compassionate Use Act. CAL. HEALTH & SAFETY CODE § 11362.5 (West 2005).
37. *Gonzales*, 545 U.S. at 21.
38. *Id.*
39. *Id.* at 23.
40. *Id.* at 22.
41. *Id.* at 24.

this distinction "pivotal" because, "where the class of activities is regulated and that class is within the reach of federal power, the courts have no power to excise, as trivial, individual instances of the class."[42] The Court further noted its task was not to "determine whether respondents' activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a 'rational basis' exists for so concluding."[43] When the Court considered the difficulty of enforcing the CSA if Californians were allowed to grow marijuana medicinally, it had "no difficulty concluding that Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA."[44]

Raich remains the Court's most recent Commerce Clause analysis, leaving lower courts to grapple with its implications on the *Lopez* and *Morrison* holdings, as well as its effect on Congress's power to regulate the first two *Lopez* categories. Thus far, lower courts have limited *Raich*'s applicability to legislation that regulates activities that substantially affect interstate commerce, or those under the third *Lopez* category.

B. The Sex Offender Registration and Notification Act (SORNA)

SORNA created an "unprecedented public safety resource" allowing individuals to search all public, state, territory, and tribal sex offender registries with the click of a mouse.[45] The federal registry, entitled the Dru Sjodin National Sex Offender Public Website, allows an individual to search for offenders by name, jurisdiction, zip code, county, city, or to utilize a national search.[46] To ensure that sex offenders register, and thus keep the website comprehensive, SORNA also includes a criminal enforcement provision.[47] Although SORNA is the first statute making a sex offender's failure to register a federal offense, it is not the federal government's first attempt to regulate sex offenders through registration requirements. In fact, prior to SORNA's enactment, Congress had already passed several statutes implementing sex offender registries.

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42. *Id.* at 23 (quoting Perez v. United States, 402 U.S. 146, 154 (1971) (internal quotations omitted)).
43. *Id.* at 22.
44. *Id.* at 23.
45. Press Release, U.S. Department of Justice, Office of Justice Programs, Department of Justice Announces Improvements and Name Change for Dru Sjodin National Sex Offender Public Web Site (Dec. 3, 2008), http://www.ojp.gov/newsroom/pressreleases/2008/smart09009.htm.
46. About the Dru Sjodin National Sex Offender Public Web site, http://www.nsopw.gov/Core/About.Aspx (last visited Apr. 1, 2010).
47. 18 U.S.C. § 2250 (2006).

1. Overview of Pre-SORNA Legislation

The first federal regulation of sex offenders was the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act ("Wetterling Act").[48] Passed in 1994 as part of the Violent Crime and Law Enforcement Act, the Wetterling Act conditions the receipt of federal funding on a "state's adoption of sex offender registration laws and set[s] minimum standards for state programs."[49]

Two years later, Congress amended the Wetterling Act to include "Megan's Law,"[50] a provision named after seven-year-old victim Megan Kanka.[51] In a provision strongly lobbied by Megan's parents and supporters, Megan's Law made the state registries created under the Wetterling Act available to the public.[52] Eventually, every jurisdiction passed sex offender registration laws in accordance with the Wetterling Act and Megan's Law.[53]

2. SORNA

Attempting to further tighten federal control over sex offenders, Congress passed the Adam Walsh Act (AWA), on July 27, 2006, the twenty-fifth anniversary of six-year-old Adam Walsh's murder.[54] SORNA, contained in Title I of the AWA, took the registration trend first established in the Wetterling Act one step further by providing a classification system of sex offenders, and notably, criminalizing the failure to register.[55] Because the AWA will eventually repeal the Wetterling Act and other federal statutes

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48. Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, 42 U.S.C. § 14071 (2006). The Wetterling Act was passed in response to the kidnapping of eleven-year-old Jacob Wetterling in 1989 by three masked gunmen. Jacob Wetterling Resource Center, Jacob's Story, http://www.jwrc.org/WhoWeAre/History/JacobsStory/tabid/108/Default.aspx (last visited Apr. 1, 2010). His remains were never found and his case remains open. *Id.*
49. Smith v. Doe, 538 U.S. 84, 89–90 (2003); s*ee* 42 U.S.C. § 14071 (2006).
50. Megan's Law, 42 U.S.C. § 14071(d) (1996) (current version at 42 U.S.C. § 14071(e) (2000)).
51. Parents for Megan's Law and the Crime Victim's Center, http://www.parentsformeganslaw.org/public/meganFederal.html (last visited Apr. 1, 2010).
52. 42 U.S.C. § 14071(e) (2006).
53. Wayne Logan, *Horizontal Federalism in an Age of Criminal Justice Interconnectedness*, 154 U. PA. L. REV. 257, 280 (2005).
54. Yet another child harmed by the hands of a vicious predator, Adam Walsh was abducted outside of a mall in Florida and brutally murdered. Rich Phillips, *Police: Drifter Killed Adam Walsh in 1981*, www.cnn.com, Dec. 16, 2008, http://edition.cnn.com/2008/CRIME/12/16/walsh.case.closed/. Unsolved until recently, his case served as inspiration for the sweeping Act aimed at protecting children from sexual exploitation and violent crime. *Id.*
55. *See* 18 U.S.C. § 2250 (2006).

targeting sex offenders,[56] SORNA provides a comprehensive registration and enforcement scheme, becoming the new "backbone of federal sex offender registration law."[57]

a. Purpose and Summary of SORNA

The official purpose of SORNA is to "protect the public from sex offenders and offenders against children."[58] By establishing a national registry, Congress sought to "increase the effectiveness of state sex-offender registries by eliminating the loopholes that accompany each state having its own unique registry system."[59]

Legislative history of the Act also demonstrates Congress's concern over sex offenders "slip[ping] through the cracks" of state registries by traveling from state to state.[60] The House Judiciary Committee Report on an earlier version of SORNA specifically emphasized the "transient nature of sex offenders and the inability of the States to track these offenders."[61] The Report estimated that "over 100,000 sex offenders, or nearly one-fifth in the Nation are 'missing,' meaning that they have not complied with sex offender registration requirements."[62] Co-sponsor Senator Orrin Hatch similarly argued that SORNA was

> critical to sew together the patch-work quilt of 50 different State attempts to identify and keep track of sex offenders. . . . Laws regarding registration for sex offenders have not been consistent from State to State[;] now all states will lock arms and present a unified front in the battle to protect children. Web sites that have been weak in the past, due to weak laws and haphazard updating and based on inaccurate information, will now be accurate, updated, and useful for finding sex offenders.[63]

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56. 42 U.S.C. §§ 14071-14073 were repealed one year after the availability of the computer software required to implement SORNA's registry. Adam Walsh Child Protection and Child Safety Act of 2006, Pub. L. No. 109-248 § 129, 120 Stat. 587, 600–01 (2006).
57. Corey Rayburn Yung, *One of These Laws is Not Like the Others: Why the Federal Sex Offender Registration and Notification Act Raises New Constitutional Questions*, 46 HARV. J. ON LEGIS. 369, 378 (2009).
58. 42 U.S.C. § 16901 (2006).
59. United States v. Myers, 591 F. Supp. 2d 1312, 1316 (S.D. Fla. 2008) (citing 72 Fed. Reg. 8894-01 (Feb. 28, 2007)).
60. 152 CONG. REC. H5730 (2006) (statement of Rep. Van Hollen).
61. H.R. REP. NO. 109-218, at 23 (2005).
62. *Id.* at 26.
63. 152 CONG. REC. S8012, 8013 (daily ed. July 20, 2006) (statement of Sen. Hatch); *see also* Wayne A. Logan, *Criminal Justice Federalism and National Sex Offender Policy*, 6 OHIO ST. J. OF CRIM. L. 51, 75 (2008).

To achieve these goals, SORNA includes two main components: "the state component and the component applying to individuals."[64] The state component conditions the receipt of federal funds on implementing a registry in compliance with SORNA requirements and ensuring such registry is compatible for use in the national registry.[65] The initial deadline for compliance was July 27, 2009, but a state may apply for an extension.[66] At the time of this article's publication, only the State of Ohio had complied with the requirements.[67]

The component applying to individuals is also divided into two parts, the registration requirements and the criminal enforcement of this registration. Sex offenders are categorized by tier based on the severity of their offense and must register in accordance with the requirements of their tier.[68] Failure to register can result in criminal prosecution under 18 U.S.C. § 2250(a)(2)(B) or a state penalty established pursuant to 42 U.S.C. § 16913.[69]

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64. United States v. Ditomasso, 552 F. Supp. 2d 233, 236 (D. R.I. 2008).
65. 42 U.S.C. §§ 16912, 16918-16919, 16925 (2006).
66. *Id.* § 16924.
67. U.S. Department of Justice, Office of Justice Programs, SMART, Status of Jurisdictions, http://www.ojp.gov/smart/faqs/faqs_statusofjurisdictions.pdf.
68. 42 U.S.C. § 16911 (2006). A tier I sex offender is "a sex offender other than a tier II or tier III sex offender." A tier II sex offender is "a sex offender other than a tier III sex offender whose offense is punishable by imprisonment for more than 1 year and–"
    (A) is comparable to or more severe than the following offenses, when committed against a minor, or an attempt or conspiracy to commit such an offense against a minor:
        (i) sex trafficking (as described in section 1591 of Title 18);
        (ii) coercion and enticement (as described in section 2422(b) of Title 18);
        (iii) transportation with intent to engage in criminal sexual activity (as described in section 2423(a)) of Title 18;
        (iv) abusive sexual conduct (as described in section 2244 of Title 18);
    (B) involves–
        (i) use of a minor in a sexual performance;
        (ii) solicitation of a minor to practice prostitution; or
        (iii) production or distribution of child pornography; or
    (C) occurs after the offender becomes a tier I sex offender.

    A tier III sex offender is "a sex offender whose offense is punishable by imprisonment for more than 1 year and–"
    (A) is comparable to or more severe than the following offenses, or an attempt or conspiracy to commit such an offense:
        (i) aggravated sexual abuse or sexual abuse (as described in sections 2241 and 2242 of Title 18); or
        (ii) abusive sexual conduct (as described in section 2244 of Title 18) against a minor who has not attained the age of 13 years;
    (B) involves kidnapping of a minor (unless committed by a parent or guardian); or
    (C) occurs after the offender becomes a tier II sex offender.
69. 18 U.S.C. § 2250 (2006); 42 U.S.C. § 16913 (2006).

b. Registration Provision: 42 U.S.C. § 16913

Under § 16913, a sex offender is required to register in every jurisdiction in which he or she resides, "is an employee," or "is a student."[70] The offender must "keep the registration current" by notifying at least one jurisdiction involved of any change of "name, residence, employment, or student status" within three days of the change.[71] Each jurisdiction is required to institute a criminal penalty of no less than one year of imprisonment for failure to comply with this requirement.[72] An offender who satisfies the elements of § 2250 may be federally prosecuted.[73]

c. Enforcement Provision: 18 U.S.C. § 2250

Unlike the Wetterling Act, or any other prior federal legislation, SORNA makes the failure to register or update a registry a federal crime. The two groups of offenders under § 2250's reach are those convicted of a federal sex crime and those convicted of a state sex crime who travel in interstate commerce.[74] Section 2250(a)(2)(B) governs the latter group[75] and requires that the government prove the offender: (1) had a duty to register under § 16913; (2) "travels in interstate commerce"; and (3) knowingly fails to register or update a registration.[76] Section 2250(a)(2)(B) has been challenged on

70. 42 U.S.C. § 16913(a).
71. *Id.* § 16913(a), (c).
72. *Id.* § 16913(e).
73. 18 U.S.C. § 2250.
74. *Id.* § 2250(a).
75. Whether the failure to register by offenders convicted under federal law goes beyond Congress's power under the Commerce Clause is beyond the scope of this Comment. For a discussion of the validity of § 2250(a)(2)(A) under the Commerce Clause, *see* Robin Morse, Note, *Federalism Challenges to the Adam Walsh Act*, 89 B.U. L. Rev. 1753 (2009).
76. § 2250(a). In its entirety, the subsection provides:

> (a) In general.–Whoever–
>
> (1) is required to register under the Sex Offender Registration and Notification Act;
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> (2)(A) is a sex offender as defined for the purposes of the Sex Offender Registration and Notification Act by reason of a conviction under Federal law (including the Uniform Code of Military Justice), the law of the District of Columbia, Indian tribal law, or the law of any territory or possession of the United States; or
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> (B) travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country; and
>
> (3) knowingly fails to register or update a registration as required by the Sex Offender Registration and Notification Act;
>
> shall be fined under this title or imprisoned not more than 10 years, or both.

numerous constitutional grounds, including whether the provision exceeds Congress's power under the Commerce Clause.[77]

C. The Majority of Courts Have Upheld § 2250(a)(2)(B) under the Commerce Clause

Since SORNA's passage in 2006, numerous district and appellate courts have ruled on § 2250(a)(2)(B)'s constitutionality under the Commerce Clause.[78] Of these decisions, very few courts have found the provision unconstitutional.[79] Despite the clear majority on the issue of constitutionality, there remains dissension within this majority as to the source of Congress's Commerce Clause power to enact SORNA. Nearly all courts have applied the traditional *Lopez* three-prong analysis, but these courts have disagreed over which *Lopez* category § 2250(a)(2)(B) should be analyzed.

1. Courts Upholding § 2250(a)(2)(B)

The vast majority of courts, including the Fourth[80] and Eighth[81] Circuits, have upheld § 2250(a)(2)(B) under the Commerce Clause, but there is no unanimous opinion as to the reasons supporting the section's constitutionality. Many courts continue to disagree as to which *Lopez* category the provision falls under. Alternatively, a few courts have upheld the provision with little to no analysis as to which *Lopez* category the section belongs.[82]

a. Courts Upholding § 2250(a)(2)(B) Under the First or Second *Lopez* Categories

Courts holding that the provision is authorized under the first or second *Lopez* categories have focused on the statute's jurisdictional element requiring

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77. *See* Tracy Bateman Farrell, Annotation, *Validity, Construction, and Application of Federal Sex Offender Registration and Notification Act (SORNA), 42 U.S.C.A. §§ 16901 et seq., its Enforcement Provision, 18 U.S.C.A. § 2250, and Associated Regulations*, 30 A.L.R. Fed. 2d 213 (2008) (noting the following challenges: nondelegation doctrine, ex post facto, procedural due process, substantive due process, commerce clause, Tenth Amendment, spending power of Congress, right to travel, equal protection, freedom to associate, right to privacy, Administrative Procedure Act).

78. *See* Yung, *supra* note 57, at 410.

79. *Id.*

80. United States v. Hatcher, 560 F.3d 222 (4th Cir. 2009).

81. United States v. May, 535 F.3d 912 (8th Cir. 2008).

82. United States v. Madera, 474 F. Supp. 2d 1257, 1265 (M.D. Fla. 2007) (finding that tracking sex offenders nationwide was sufficient to "fall under the veil of the Commerce Clause," but failing to mention which Lopez category specifically authorized the statute).

that the offender "travel[] in interstate commerce." The Fourth Circuit, for example, found the express jurisdictional element "limit[ed] [the statute's] application to persons who move in interstate commerce in violation of SORNA."[83] Therefore, the offenders implicate the first Lopez category because of the offenders' "use of the channels of interstate commerce"[84] to relocate to another state and avoid registration.

Additionally, several courts have found the section constitutional by analogizing it to other statutes previously upheld under the Commerce Clause. For instance, the court in *United States v. Trent* found § 2250(a)(2)(B) comparable to the following statutes: (1) 18 U.S.C. § 2423(b),[85] prohibiting interstate travel for the purpose of engaging in certain sexual conduct with a minor; (2) 18 U.S.C. § 2261(a),[86] criminalizing domestic violence occurring during interstate travel; and (3) 18 U.S.C. § 922(g),[87] banning the possession of ammunition that had moved in interstate commerce.[88] The court reasoned that SORNA, like these statutes, includes a jurisdictional element and thus does not violate the Commerce Clause.[89]

Next, many courts have found that the section falls under the second *Lopez* category, "the instrumentalities of interstate commerce, or persons or things in interstate commerce,"[90] based upon the category's plain language. Thus, because sex offenders are "persons" and must travel "in interstate commerce" at some point in time to violate the statute, these courts reasoned that the provision brings the statute under this category of Congress's power.[91] Rejecting arguments that the statute could reach individuals that have traveled in interstate commerce at any time, rather than prior to their failure to register, courts have construed the language "travels in interstate commerce" to mean

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83. *Hatcher*, 560 F.3d at 234.
84. United States v. Lopez, 514 U.S. 549, 553 (1995).
85. *See, e.g.*, United States v. Tykarsky, 446 F.3d 458 (3d Cir. 2006) (upholding 18 U.S.C. § 2423(b) (2006) under the Commerce Clause).
86. *See, e.g.*, United States v. Lankford, 196 F.3d 563 (5th Cir. 1999) (upholding 18 U.S.C. § 2261(a) (1998) under the Commerce Clause), *cert. denied*, 529 U.S. 1119 (2000).
87. *See, e.g.*, United States v. Henry, 429 F.3d 603 (6th Cir. 2005) (upholding 18 U.S.C. § 922(g) (1998) under the Commerce Clause).
88. United States v. Trent, 568 F. Supp. 2d 857, 862–63 (S.D. Ohio 2008).
89. *Id.* at 862–63.
90. *See* United States v. May, 535 F.3d 912, 921 (8th Cir. 2008); United States v. Waybright, 561 F. Supp. 2d 1154, 1161 (D. Mont. 2008); United States v. Ditomasso, 552 F. Supp. 2d 233, 245–46 (D. R.I. 2008); United States v. Hall, 577 F. Supp. 2d 610, 619 (N.D. N.Y. 2008); United States v. Pena, 582 F. Supp. 2d 851, 859 (W.D. Tex. 2008); United States v. Torres, 573 F. Supp. 2d 925, 936 (W.D. Tex. 2008).
91. *See May*, 535 F.3d 912.

that the defendant must have traveled in interstate commerce after the passage of the Act.[92]

These courts have rejected defendants' claims that the jurisdictional element must relate in some way to the regulated activity.[93] In other words, some courts have refused to hold that the interstate travel element must be tied to the failure to register, either by requiring the travel be with the intent or purpose to evade registration or even by simply requiring that the travel be to change residences.[94] For instance, in *United States v. Ditomasso*, the court stated that "[t]here is no constitutional requirement under the second prong that the 'person[ ] or thing[ ] in interstate commerce' travels with the intent or is moved with intent to commit a crime."[95] Supporting this contention, the court relied upon "a plethora of statutes lacking an element of intent" that have been found constitutional under the second prong.[96] Notably, this "plethora" only contained statutes that criminalize the possession of a gun that has traveled in interstate commerce.

Conversely, in *Hann*, the court acknowledged that § 2250(a)(2)(B) is different from other criminal statutes previously upheld under the Commerce Clause because its jurisdictional element is not linked to the regulated activity, but then determined this difference was not dispositive.[97] Rather, the *Hann* court disregarded this distinction based upon on the language in *Lopez* allowing federal regulation of "persons in interstate commerce even though the threat at issue may come only from intrastate activities."[98] The court, applying this language to § 2250(a)(2)(B), found Congress could regulate the sex offenders who travel in interstate commerce for any purpose even though the threat, sex offenders evading registration, is intrastate.[99]

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92. United States v. Hann, 574 F. Supp. 2d 827, 832 (M.D. Tenn. 2008).
93. *See, e.g.*, *Ditomasso*, 552 F. Supp. 2d at 247; *Hall*, 577 F. Supp. 2d at 619; *Hann*, 574 F. Supp. 2d at 832.
94. *See, e.g.*, *Ditomasso*, 552 F. Supp. 2d at 247; *Hall*, 577 F. Supp. 2d at 619; *Hann*, 574 F. Supp. 2d at 832.
95. *Ditomasso*, 552 F. Supp. 2d at 247.
96. *Id.*
97. *Hann*, 574 F. Supp. 2d at 832.
98. *Id.* (internal quotations omitted) (citing United States v. Lopez, 514 U.S. 549, 558 (1995).
99. *Id.*

b. Courts Upholding § 2250(a)(2)(B) under the Third *Lopez* Category

Few courts have found § 2250(a)(2)(B) constitutional under the third *Lopez* category, "activities that substantially affect interstate commerce."[100] In *United States v. Passaro*, the court applied the four factors outlined in *Morrison*, and concluded that § 2250(a)(2)(B) "regulates activities substantially related to interstate commerce[,]" even though the activity was not economic and there were no legislative findings.[101] In support of its conclusion, the court noted that the AWA is a comprehensive statute, § 2250(a)(2)(B) contains a jurisdictional element, and a link exists between the regulated activity and interstate commerce.[102] The link relied on by the court consisted of two parts: the effect of tracking sex offenders on the pornography market and the effect sex offenders have on the economic development of an area.[103]

2. Courts Overturning § 2250(a)(2)(B) Under the Commerce Clause

Very few courts have found that § 2250(a)(2)(B) exceeds Congress's power under the Commerce Clause. In a lengthy opinion, the court in *United States v. Myers* engaged in a thorough analysis of Commerce Clause precedent before concluding that § 2250(a)(2)(B) falls under neither the first nor second *Lopez* categories.[104] Examining the statute's plain language, the court found that the jurisdictional element, "travels in interstate commerce," was merely "an indefinite requirement that only requires a person to have traveled in interstate commerce" at some point in time with no connection to the purpose of the travel.[105] Rather than "criminaliz[ing] interstate travel for the purpose of avoiding registration" or for the failure "to register as the sex offender in the act of traveling in interstate commerce," the "purpose attached to the travel is left unstated and is utterly divorced from the activity being regulated:

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100. *See, e.g.*, United States v. Holt, No. 3:07-cr-0630-JAJ, 2008 WL 1776495 (S.D. Iowa Apr. 14, 2008); United States v. Hacker, No. 8:07CR243, 2008 WL 312689 (D. Neb. Feb. 1, 2008); United States v. Dixon, No. 3:07-CR-72(01) RM, 2007 WL 4553720 (N.D. Ind. Dec. 18, 2007); United States v. Brown, No. 07 Cr. 485(HB), 2007 WL 4372829 (S.D.N.Y. Dec. 12, 2007).

101. United States v. Passaro, No. 07-CR-2308 BEN, 2007 WL 6147936, at *4 (S.D. Cal. 2007 Dec. 17, 2007).

102. *Id.*

103. *Id.* at *6. The reasoning that crime has an economic effect on an area was expressly rejected by the Court in *United States v. Morrison*, 529 U.S. 598, 612 (2000).

104. United States v. Myers, 591 F. Supp. 2d 1312 (2008).

105. *Id.* at 1338.

knowingly failing to register as a sex offender."[106] Thus, "the regulated activity . . . is a completely local, non-economic activity."[107]

Next, the court evaluated § 2250(a)(2)(B) under the three areas Congress may regulate under *Lopez* by examining the cases actually cited by the *Lopez* Court.[108] Although the *Myers* court agreed that Congress intended to enact § 2250(a)(2)(B) under its authority over the first two *Lopez* categories, it determined that Congress lacked the power to do so under both of the categories.[109] Taking a bold position, the court accused the majority of other courts upholding § 2250(a)(2)(B) of "read[ing] Lopez's articulation [of the categories] as the Commerce Clause itself, or as a statute written by the Supreme Court for Congress to use and apply[,]" rather than as its true purpose, a "convenient summary . . . of the rich body of law that has developed over the past two centuries regarding the Commerce Clause."[110] After considering the cases cited by *Lopez* as examples of each of the first two categories, the court believed that the regulation at issue in SORNA is unlike any regulation previously upheld by the Court because it does not pertain to: (1) the use of the channels for a specific illegal purpose, such as bringing an underage woman across state lines for immoral purposes;[111] (2) an instrumentality of interstate commerce, such as trains[112] or airplanes; or (3) persons posing a threat to the instrumentalities, such as the theft of goods.[113] The court accordingly concluded that a jurisdictional element that attaches to a person once they have traveled in interstate commerce, regardless of the purpose for their travel, goes beyond Congress's constitutional power to regulate interstate commerce.[114]

The court in *United States v. Powers* also found § 2250(a)(2)(B) unconstitutional under the Commerce Clause.[115] The *Powers* court, unlike the majority of cases, held that the statute did not regulate the channels or instrumentalities of commerce or "persons or things in interstate commerce."[116] Thus, the court analyzed the provision under the third *Lopez* category, activities that substantially affect interstate commerce.[117] Finding the statute

106. *Id.*
107. *Id.*
108. *Id*. at 1338–39.
109. *Id.* at 1347–48.
110. *Id.* at 1340.
111. *See* Hoke v. United States, 227 U.S. 308 (1913).
112. *See* Shreveport Rate Cases, 234 U.S. 342 (1914).
113. *See* Perez v. United States, 402 U.S. 146 (1971).
114. *Myers*, 591 F. Supp. 2d at 1329.
115. United States v. Powers, 544 F. Supp. 2d 1331 (2008).
116. *Id.* at 1333–34.
117. *Id*.

similar to those at issue in *Lopez* and *Morrison*, the court found that SORNA "has nothing to do with commerce or any form of economic enterprise."[118] In addition, the court rejected the argument that the jurisdictional element created a sufficient nexus to interstate commerce, instead finding it nothing more than "statutory lip service."[119] The court explained that "[t]he mere fact that the individual has, at some point, traveled in interstate commerce does not establish that his or her subsequent failure to register 'substantially affects interstate commerce.'"[120] Furthermore, the court noted that the criminal enforcement of sex offender registration was not a matter that defied a local solution or required federal assistance, as each state had already created state registries.[121]

III. ANALYSIS

Defendants prosecuted under § 2250(a)(2)(B) of SORNA have repeatedly challenged Congress's authority under the Commerce Clause to enact the enforcement provision. Two potential arguments exist for upholding the statute. First, § 2250(a)(2)(B) contains what courts refer to as a "jurisdictional element," an element of the crime intended to create a link between the activity being regulated and interstate commerce.[122] This is the argument wrongly adopted by a majority of courts. Second, § 2250(a)(2)(B) is a key component of SORNA, a comprehensive regulatory scheme intended by Congress to combat an interstate problem, tracking the location of sex offenders nationwide.

Despite the existence of two independent arguments supporting the provision's constitutionality, courts have rarely discussed the second potential line of reasoning and, instead, have incorrectly held that the presence of a jurisdictional element alone establishes the statute's constitutionality. While courts have, for the most part, still reached the correct conclusion that § 2250(a)(2)(B) is authorized under Congress's Commerce Clause power, their inconsistent opinions and ease in allowing SORNA's broad jurisdictional element to bring a federal criminal statute under Congress's Commerce Clause authority raise legitimate concerns. This section will demonstrate why SORNA is different from other federal criminal statutes containing a jurisdictional element, how courts should have analyzed § 2250(a)(2)(B) under

118. *Id.* at 1335.
119. *Id.*
120. *Id.* (internal citations omitted).
121. *Id.* at 1336.
122. *See* United States v. Lopez, 514 U.S. 549, 561 (1995).

Gonzales v. Raich, and the negative results that could follow the courts' treatment of SORNA.

A. Jurisdictional Elements Should Have a Nexus to the Regulated Activity

The majority of courts analyzing § 2250(a)(2)(B) have held that because the section requires that the defendant "travel in interstate commerce,"[123] the statute contains a jurisdictional element that renders SORNA constitutional under the first two *Lopez* categories.[124] Courts have failed, however, to compare SORNA's jurisdictional element to those in other constitutional statutes or to mention why the Supreme Court in both *Lopez* and *Morrison* used the presence of a jurisdictional element as a factor in determining a federal statute's constitutionality.

1. SORNA'S Jurisdictional Element Has No Nexus to the Failure to Register[125]

SORNA's enforcement provision, § 2250(a)(2)(B), punishes a sex offender who (1) has a duty to register under § 16913; (2) travels in interstate commerce; and (3) knowingly fails to register or update a registration.[126] The majority of courts have found the statute constitutional under the Commerce Clause based upon the presence of the second element alone, the defendant's travel in interstate commerce. When § 2250(a)(2)(B) is compared to other criminal statutes previously upheld by federal courts, however, it is evident that SORNA's jurisdictional element is unlike those contained in statutes upheld in the past. Several courts have made this comparison, but most have either incorrectly determined SORNA is not distinguishable from these statutes or have failed to adequately explain why the distinction matters.[127]

For example, several courts have analogized SORNA to a provision of the VAWA, 18 U.S.C. § 2261(a). This VAWA provision punishes two types of defendants: (1) a person who travels in interstate commerce "with the intent

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123. 18 U.S.C. § 2250 (2006).

124. *See* United States v. May, 535 F.3d 912, 921–22 (8th Cir. 2008) ("SORNA includes an express and clear jurisdictional element . . . .").

125. This argument is also propsed by Professor Yung. Yung, *supra* note 57. Yung similarly argues that the jurisdictional element in § 2250(a)(2)(B) lacks a temporal requirement or any connection to the failure to register and is an invalid exercise of Congress's power under the Commerce Clause. *Id.* at 415–17.

126. 18 U.S.C. § 2250(a).

127. *See* United States v. Hann, 574 F. Supp. 2d 827, 832 (M.D. Tenn. 2008); United States v. Myers, 591 F. Supp. 2d 1312, 1344 (S.D. Fla. 2008).

to kill, injure, harass, or intimidate a spouse, intimate partner, or dating partner, and who, *in the course of or as a result of such travel*, commits or attempts to commit a crime of violence against that [person;]" and (2) "a person who *causes a spouse, intimate partner, or dating partner to travel in interstate . . . commerce* . . . by force, coercion, duress, or fraud, and . . . commits or attempts to commit a crime of violence against that [person] . . . ."[128]

When the language of § 2250(a)(2)(B) is compared with that in the VAWA, it is clear that the two statutes are distinguishable. Specifically, SORNA fails to require a specific purpose for the defendant's interstate travel or to prohibit a certain activity during the interstate travel. In other words, SORNA does not require that the offender intend to travel in interstate commerce in order to evade registration. In fact, SORNA fails to include even a temporal requirement to the travel, such as mandating that the defendant travel in interstate commerce within a year of the alleged failure to register. Rather, SORNA's plain language simply punishes a defendant who "travels in interstate commerce" at any time and for any purpose.[129] The same conclusion is apparent after comparing SORNA to 18 U.S.C. § 2423(b), which prohibits interstate travel for the *purpose* of engaging in certain sexual conduct with a minor, [130] and 18 U.S.C. § 247, which has been interpreted to punish traveling in interstate commerce for the purpose of damaging religious property.[131] SORNA's jurisdictional element is unlike those contained in other criminal statutes, but courts have still consistently upheld the provision.

2. Broad Jurisdictional Elements Risk Unlimited Congressional Power

Jurisdictional elements ensure that the regulated activity falls under Congress's jurisdiction over interstate commerce.[132] Although the majority of courts examining SORNA have either overlooked or disregarded its jurisdictional element's lack of a connection to the use of the channels of interstate commerce, this missing link distinguishes SORNA from other federal criminal enactments and pushes § 2250(a)(2)(B) beyond the authority of the first and second *Lopez* categories. As explained in *Lopez*, the presence of a jurisdictional element "ensure[s], through a case-by-case inquiry, that the

128. 18 U.S.C. § 2261(a) (2006) (emphasis added).
129. *See Myers*, 591 F. Supp. 2d at 1344.
130. *See* United States v. Tykarsky, 446 F.3d 458 (3d Cir. 2006) (upholding 18 U.S.C. § 2423(b) (1998) under the Commerce Clause).
131. *See* United States v. Ballinger, 395 F.3d 1218, 1227 (11th Cir. 2005) (upholding 18 U.S.C. § 247(b) (1998) under the Commerce Clause).
132. *See* United States v. Lopez, 514 U.S. 549, 561 (1995).

[regulated activity] in question affects interstate commerce."[133] While *Lopez*'s explanation of the jurisdictional requirement was regarding a regulation that fell within the third category, an activity that substantially affects interstate commerce, the principal transcends the category–the jurisdictional element makes certain that the activity relates, or has a nexus, to interstate commerce.

By loosening the standards for jurisdictional requirements, courts run the risk that Congress will use a blanket jurisdictional element to regulate nearly any activity.[134] Congress, following the majority's analysis of SORNA, could easily incorporate blanket jurisdictional elements into future statutes that bear little to no relation to interstate commerce. For an extreme example, Congress could pass a federal statute criminalizing murder by a defendant that "travels in interstate commerce." So long as the hypothetical statute contains this blanket jurisdictional element, there is no distinction between the language of § 2250(a)(2)(B) and this potential statute. Nearly any activity could become federally regulated if courts allow unqualified jurisdictional elements, such as "travels in interstate commerce," to independently establish a statute's constitutionality under the Commerce Clause.[135]

This dangerous extension of federal power, however, could easily be restrained by requiring that jurisdictional elements have a nexus to the actual regulated activity when the jurisdictional element alone establishes the provision's constitutionality. SORNA, for example, could require that defendants travel in interstate commerce for the purpose of evading registration or even for the purpose of changing their residence, without an intent to evade.[136] This would ensure that offenders traveling from state to state cannot knowingly attempt to escape registration, while maintaining limits on Congress's power over those offenders whose interstate travel has no connection to their failure to register.

B. Under *Raich* § 2250(a)(2)(B) is Constitutional

Most courts deciding § 2250(a)(2)(B)'s constitutionality under the Commerce Clause have only considered whether the provision is authorized under one of the three categories set forth in *Lopez*.[137] This single step

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133. *Id.*

134. *See also* Yung, *supra* note 57, at 416 ("Any crime can be federalized simply by adding an interstate travel element and waiting for any alleged criminal to cross state lines, if even for a moment.").

135. *Id.*

136. *See id*. (arguing that § 2250(a)(2)(B) should be amended to "more closely follow the language the Court has utilized in Lopez and Morrison or use the model of the Mann Act so the travel is explicitly linked with the failure to register").

137. *See* discussion *supra* Part II.C.

approach has resulted in inconsistent determinations about which category the section falls under.[138] Many of these courts upholding § 2250(a)(2)(B) also mention the national purpose of the statute and that SORNA provides an interstate regulatory scheme, but fail to expressly apply *Raich* to SORNA.[139] Rather than providing a cursory treatment of SORNA's interstate qualities and a faulty analysis placing § 2250(a)(2)(B) within the first two *Lopez* categories based solely on its jurisdictional element, courts should uphold the provision under *Raich*.

1. The Court's Reasoning in Raich Should Apply to all Lopez Categories

In *Raich*, the Supreme Court considered the narrow issue of whether Congress could regulate purely local, intrastate activity under the CSA when that intrastate activity substantially affected interstate commerce.[140] The court concluded that Congress could regulate such intrastate activity because the CSA established a comprehensive regulatory scheme for an economic activity and the intrastate activity could, in aggregation, undercut the enforcement of the entire scheme.[141] Furthermore, the Court did not consider whether this purely intrastate activity actually had a substantial effect on interstate commerce, but only whether Congress had a rational basis for so concluding.[142] The court's analysis revolved around an economic activity that fell under the third *Lopez* category, but the Court did not explicitly limit its holding to the third category or rely upon principals that are inapplicable to activities within the first two categories.

The reasoning in *Raich* is also applicable to activities within the first and second *Lopez* categories. Specifically, *Raich* should apply to the first category, "the use of the channels of interstate commerce," to allow Congress to regulate a purely intrastate use of the channels if the intrastate activity could effectively undermine Congress's comprehensive regulation of the channels of interstate commerce. Similarly, under the second category, "the instrumentalities of interstate commerce, or persons or things in interstate commerce," *Raich* should be interpreted to permit Congress to regulate the instrumentalities of intrastate commerce if it is necessary to ensure the successful regulation of the instrumentalities of interstate commerce.

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138. *Id.*
139. *See* United States v. Ditomasso, 552 F. Supp. 2d 233, 246 (D. R.I. 2008).
140. Gonzales v. Raich, 545 U.S. 1, 9 (2005).
141. *Id.* at 17–18.
142. *Id.* at 22.

Several reasons support applying *Raich* to any federal statute regardless of the category it falls under. First, there is no reason to distinguish the third *Lopez* category from the first two when the concern is whether an intrastate activity will threaten the success of a broad statutory scheme regulating interstate activity. *Raich* focused on the intrastate activity's effect on the interstate activity; however, the interstate activity just happened to be an economic market and thus fell under the third category.

Furthermore, extending *Raich*'s reasoning to the regulation of the use of the channels or the instrumentalities of interstate commerce will not risk validating statutes such as those rejected in *Lopez* and *Morrison*. As a whole, neither the VAWA nor the Gun-Free School Zones Act regulated the use of the channels or the instrumentalities of interstate commerce. Thus, no valid federal regulation of an interstate activity existed that could be undermined by the possession of a firearm or inflicting domestic violence. Additionally, neither provision was comprehensive or part of a detailed framework of legislation. Therefore, applying *Raich* to the second and third Lopez categories will not improperly expand the breadth of activities that Congress may regulate under the Commerce Clause, or conflict with the Court's opinions in *Lopez* and *Morrison*.

Finally, allowing Congress to regulate some intrastate activity in order to implement a broad interstate regulatory scheme furthers the actual purpose of the Commerce Clause. In *Raich*, the Court "reiterated that '[w]here the class of activities is regulated and that class is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class."[143] As such, where the class of activities regulated is the use or instrumentalities of the channels of interstate commerce, courts should not prohibit Congress's trivial inclusion of some intrastate activity. Increasing Congress's ability to regulate national, interstate problems is a valid concern, regardless of which *Lopez* category the interstate activity falls under.

While extending *Raich*'s holding could encourage Congress to enact more sweeping and detailed federal statutes in an attempt to ensure the statute is considered "comprehensive legislation," this risk could be prevented if courts require that the legislation possesses similar qualities to the CSA in *Raich*. Specifically, the statute must, as a whole, be a valid regulation of interstate commerce under one of the three *Lopez* categories. Moreover, the legislation must remedy a truly national problem that individual States cannot effectively regulate. Imposing such limitations will effectively curtail any unreasonable expansion of Congress's power.

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143. *Id.* at 23.

2. Why § 2250(a)(2)(B) is Constitutional Under Raich

While the presence of SORNA's jurisdictional element has troubled several courts, the purpose of SORNA and the nature of its statutory scheme bring SORNA within the authority of the Commerce Clause. Even if § 2250(a)(2)(B)'s jurisdictional element is interpreted broadly and the provision is applied to any offender who has ever traveled in interstate commerce, a defendant's purely intrastate failure to register can be regulated by SORNA under *Raich*.

Applying *Raich* to SORNA reveals that § 2250(a)(2)(B) is slightly distinguishable from the CSA at issue in *Raich*, but still constitutional. First, the CSA itself was a valid exercise of Congress's commerce power because it regulated the interstate market for controlled substances; the statute was only challenged as applied to purely intrastate activity.[144] It was also a detailed, comprehensive statutory scheme regulating the manufacture, use, and possession of controlled substances.[145] Similarly, § 2250(a)(2)(B) is a valid exercise of Congress's power under the first or second *Lopez* category if it is only used to punish offenders who use the channels of interstate commerce for the purpose of evading registration. Furthermore, the § 2250(a)(2)(B) is part of a detailed, comprehensive statutory scheme regulating the registration of sex offenders. Just as the CSA provided categories of controlled substances, SORNA establishes tiers of sex offenders. The registry requirements are detailed and encompass all sex offenders. Therefore, removing those sex offenders who commit the intrastate failure to register from SORNA's reach could defeat the purpose of the national registry. As in *Raich*, the purely intrastate failure to register under SORNA is a small section of a larger, and constitutionally valid, enactment, and courts should not excise this small provision.

Next, the CSA regulated a true economic market. SORNA, on the other hand, is not a regulation of an inherently economic activity. An activity need not be economic in nature, however, to fall under the reach of the Commerce Clause. Prohibiting the use of the channels of interstate commerce to engage in sexual conduct with a minor,[146] for example, is not an economic activity, but an undoubtedly valid exercise of congressional authority.[147] The reasoning in

144. *Id.* at 15.
145. *Id.* at 13.
146. 18 U.S.C. § 2423(b) (2006).
147. *See* United States v. Tykarsky, 446 F.3d 458 (3d Cir. 2006) (upholding 18 U.S.C. § 2423(b) under the Commerce Clause).

Raich should not be constrained to economic activities, but instead, applied to all intrastate activities that undermine Congress's ability to regulate interstate activities.[148]

Finally, in *Raich*, the Court did not require Congress to make specific findings that the "intrastate cultivation and possession of marijuana for medical purposes . . . would substantially affect the larger interstate marijuana market."[149] Rather, it only determined whether Congress had a "'rational basis' . . . for so concluding."[150] Therefore, in this instance, courts need not analyze whether the intrastate failure to register would actually undermine the effectiveness of SORNA's federal registry, but merely whether Congress had a rational basis for finding that it would.[151] In SORNA's legislative history, Congress expressed concern over the "transient nature" of sex offenders and the sheer number of unregistered sex offenders.[152] Although it is disputed whether SORNA is a truly national problem, as each state has created its own registry, the courts are confined to reviewing Congress's policy determination under rational basis review. Given the specific purpose of the statute and the comments included in the legislative history, it is likely that courts would find Congress had a rational basis for punishing the intrastate failure to register.

IV. CONCLUSION

The majority of courts have correctly upheld SORNA's criminal enforcement provision, § 2250(a)(2)(B), as a valid exercise of Congress's Commerce Clause power. Although these courts reached the correct result, most of the decisions relied solely on the presence of SORNA's blanket jurisdictional element requiring that the offender travel in interstate commerce. These holdings fail to recognize that the language of § 2250(a)(2)(B) goes beyond that found in other federal criminal statutes because it does not require that the offender's travel in interstate commerce was for the purpose of circumventing registration. Rather, the provision punishes any offender who travels in interstate commerce at any time. Allowing SORNA's broad jurisdictional element to single-handedly render the statute constitutional under the Commerce Clause risks a dangerous expansion of Congress's power. After SORNA, Congress may insert similar blanket jurisdictional elements into

148. *But see* Yung, *supra* note 57, at 422 (stating that the "import of the [*Raich*] decision is tied to activities like drug possession and distribution, which deal with economic goods" and instead analyzing § 2250(a)(2)(B) under *Morrison* and the third *Lopez* category).

149. *Raich*, 545 U.S. at 21.

150. *Id.* at 22.

151. *Id.*

152. *See* discussion *supra* Part II.B.2.a.

statutes that otherwise would be unconstitutional. Instead of relying solely on the presence of any jurisdictional element, courts should require the interstate travel element to have a nexus to the regulated activity.

If the element lacks this connection, as the element does in SORNA, the court should then analyze the provision under the Supreme Court's holding in *Gonzales v. Raich*. Under *Raich*, SORNA is constitutional because it regulates a purely intrastate activity–the failure to register–that could effectively undermine Congress's comprehensive national registry. Had courts applied *Raich* rather than focusing solely on the § 2250(a)(2)(B)'s jurisdictional element, their opinions would have uniformly analyzed SORNA without risking an expansion of Congress's power under the Commerce Clause.